BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARIA ELENA CISNEROS	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,063
WICHITA WIRE, INC.	)	
Respondent	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal from an August 6, 1996, preliminary hearing Order by Administrative Law Judge Jon L. Frobish.

ISSUES

The Administrative Law Judge granted claimant's request for the appointment of Dr. Pedro A. Murati as the authorized treating physician and for payment of the outstanding medical bills relating to claimant's treatment with Dr. Murati. The issues raised by respondent are:

(1) Whether claimant suffered accidental injury arising out of and in the course of her employment with respondent.

(2) Whether claimant provided notice to respondent within 10 days under K.S.A. 44-520 and, if not, whether just cause existed for claimant's failure to provide same.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In April 1996, claimant was employed by respondent as a welder and solderer. Claimant testified that on or about April 10, 1996, she had just finished welding on a 40-pound wheel when she picked it up, felt something pop, and immediately experienced pain and discomfort in the area of her naval. The pain and discomfort subsequently moved and became localized in her low back. She is making claim for injury to both areas. However, it is not clear from the preliminary hearing Order whether both injuries were found compensable by the Administrative Law Judge.

Claimant described the incident as follows:

> "So then one day I had a real bad pain in my bellybutton and it just blew and a lot of blood and pus came out." Prelim. Hr'g. at 5.

The office notes of claimant's personal family practice physician, Epifanio Rivera-Ortiz, M.D., were introduced as claimant's Exhibit 1 to the preliminary hearing transcript. Those records revealed that claimant had been suffering from pain and tenderness in her umbilical area since at least February 6, 1996. The Administrative Law Judge, in his Order of August 6, 1996, ordered the outstanding medical bills of Dr. Murati to be paid but deferred the payment of claimant's other medical bills "until the determination of [their] relationship to [the] back injury." Although the authorization of Dr. Murati was not expressly limited to treatment for claimant's back, that is the implication. Dr. Murati is a physiatrist and the treatment of an umbilical infection and/or hernia would not appear to be within his area of practice.

Dr. Murati examined claimant on July 15, 1996, at the request of her attorney. His report from that examination is a part of the record as claimant's Exhibit 3 to the preliminary hearing transcript. Although Dr. Murati relates both his diagnoses of umbilical infection and/or hernia and the lumbosacral strain to claimant's work, his recommendation for treatment involves only a physical therapy regimen. Accordingly, it does not appear that Dr. Murati plans to treat claimant for the umbilical condition.

As stated, claimant received treatment for the umbilical condition from Dr. Rivera. His progress notes suggest a referral to Dr. Vinzant for a surgical consult for the umbilical condition as well as hemorrhoids and varicose veins. It is not clear from the record whether claimant had seen Dr. Vinzant by the date of the preliminary hearing.

Again, it does not appear that Dr. Murati intended to treat claimant for the umbilical condition nor does it appear that the Administrative Law Judge intended his authorization of Dr. Murati to include the umbilical condition. Although his August 6, 1996, Order is silent as to the umbilical condition, the statements by the Administrative Law Judge at the conclusion of the August 6, 1996, preliminary hearing indicate that compensation was being ordered for only the back injury. At page 48 of the preliminary hearing transcript there appears the following discussion:

> "THE COURT: Ortiz. It looks like Dr. Murati is going to want to do some type of physical therapy, I guess, is his plan. I assume he's looked at some conservative treatment here. As I said, it doesn't look like a major back injury. So I'll put her with -- we'll authorize Dr. Murati then. What have I missed?"
>
> "MR. DONLEY: Are you requiring us to pay all the medical bills, and, if so, what's the basis on the payment of the medical bills related to the stomach injury?"
>
> "THE COURT: Not to the stomach. I'll authorize 'em related to the back injury, which is going to be a little tough to figure out at this point, isn't it?"

The Appeals Board finds that the August 6, 1996, preliminary hearing Order authorizes treatment only for the claimant's back. Accordingly, the Administrative Law Judge has only found the back injury to be compensable. Thus, the issues respondent raised as to notice and whether the accident arose out of and in the course of claimant's employment relate only to the back injury. There is no finding relative to the umbilical condition. Claimant did not appeal the Administrative Law Judge's Order, nor does claimant's counsel raise an issue in his brief concerning preliminary benefits for the umbilical condition or the Judge's failure to make a preliminary finding relative to that condition. Counsel for both parties appear to have been in agreement that the Administrative Law Judge could limit his Order to only the back injury. There was a discussion to this effect at the conclusion of the preliminary hearing as follows:

> "MR. HESS: What about doing this, Your Honor. Frankly, on behalf of the claimant, I would have no problem if you take the medical bills, with the exception of Murati, under advisement at this point in time till we can figure out what's related and what's not at some later hearing date or final award. We can write a letter to them and they can foreclose or stop any collection efforts until we figure that out."
>
> "THE COURT: Do you think the doctor, can he help break that out later on --"
>
> "MR. DONLEY: Yeah."
>
> "THE COURT: -- or something? All right. That's fine with me."
>
> "MR. HESS: I think he's going to have to."

> "THE COURT: Maybe you guys can work that out at another date so we can do that. So at the moment, I am just going to order Murati." Prelim. Hr'g. at 48 and 49."

The notice issue requires that we first determine a date of accident. Claimant testified to her injuries being from lifting a 40-pound wheel on April 10, 1996. She described immediately thereafter reporting the incident to one of her supervisors. Mr. Guzman testified that claimant made a comment to him about having blood and pus coming out of her naval on April 1, 1996. However, he denies that she related that condition to her work. He provided her with light-duty work and suggested that she go to a doctor. Claimant testified that it was about two weeks later before she went to her doctor and the records of Dr. Rivera show that the first time he saw claimant after February 6, 1996, was on April 15, 1996. At that time claimant reported "a flare up of the swelling in the umbilical area and has occasional slight suppuration which is worse after she has been lifting heavy objects at work." Accordingly, the April 1, 1996, record is consistent with claimant's testimony that she did not see a doctor for two weeks. The Appeals Board finds from the testimony of Mr. Heladio Guzman, together with the medical records of Dr. Rivera and the claimant's own testimony as to the interval from the accident until she saw Dr. Rivera, that the lifting incident occurred on or about April 1, 1996, and not on April 10, 1996, as claimant alleged.

K.S.A. 44-520 provides in pertinent part:

> "[P]roceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or employer's duly authorized agent shall render the giving of such notice unnecessary. The ten day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . ."

Claimant admitted that when she first talked to Mr. Guzman she did not tell him that she had back pain, only that her bellybutton had blown open and that a lot of blood and pus came out. Mr. Guzman testified that about 7 a.m. on April 1, 1996, claimant told him about having blood and pus coming out of her naval. However, she did not relate that condition to her work. That is why, although he suggested she go to a doctor, he did not provide medical treatment as a work-related injury. He did provide her light duty which he said was his custom whenever a worker requested it or if they were having a problem whether or not it was due to a work-related condition.

Claimant's counsel correctly argues that K.S.A. 44-520 requires notice of "accident" not notice of the particular injury. However, in this case claimant only provided respondent with notice of an umbilical condition on or about April 1, 1996. Claimant did not describe how that injury occurred. Therefore, she did not give notice of a work-related accident. Mr. Guzman testified that the claimant never verbally advised him of a back injury. His first notice of same was on or about July 8, 1996, when claimant provided him with a Work/School Release form from Dr. Rivera for a lumbar strain which was thereon described as work related. Based upon the record as it currently exists, the first notice of a work-related accident to respondent could be the July 1, 1996, Form E-1 Application for Hearing. That Application for Hearing was received by the Division of Workers Compensation and stamped "Received" on July 2, 1996. It was thereafter mailed to the respondent. The record does not reflect, however, when it was received by respondent. Therefore, notice will be found to have been first given by the July 8, 1996 Work/School Release form of Dr. Rivera, which is Claimant's Exhibit 2 to the preliminary hearing transcript. Obviously this is beyond 10 days of April 1, 1996. However, the claimant has alleged accident "on or about 4/10/96 and each work day thereafter". We will, therefore, examine the record for evidence of an aggravation of claimant's back injury such that a subsequent date of accident could be found to exist.

Claimant testified that her abdominal pain moved around to her back after the doctor "burnt my bellybutton." Dr. Rivera's records show that he applied some chemical cauterization with silver nitrate to the umbilical area on April 15, 1996. Accordingly, the onset of claimant's back pain would be subsequent to that date, according to claimant's own testimony. There is no mention of back pain in Dr. Rivera's office notes of April 15, 1996, nor on May 29, 1996. The first mention of back pain appears in his records of June 14, 1996, and reads: "The patient reports that she has too much pain, it is in the middle of the lumbar area and made worse by work because at work she has to lift heavy loads and any movement will produce the pain." However, Mr. Guzman testified that claimant was placed on light duty on April 1, 1996. Claimant does not dispute this. Accordingly, it is difficult to understand how claimant developed low back pain from heavy lifting in June. On June 14, 1996, Dr. Rivera provided work restrictions limiting her lifting to 20 pounds and no stooping or bending more than 30 degrees. Nevertheless, Dr. Rivera's June 24, 1996, reflect that "the patient reports still with lumbar pain, unable to lift too much and is getting worse at work. The patient reports that she had never sprained it so bad and she blames all of it on her work because it is so heavy and so strenuous and demanding." Whereupon Dr. Rivera again restricted lifting to 20 pounds but provided for no stooping or bending more than 20 degrees. Dr. Rivera also ordered an MRI.

At the office visit of June 28, 1996, claimant reported no improvement at all with her lumbar pain to Dr. Rivera. The MRI examination was reported as "completely negative." The last office note by Dr. Rivera contained in Claimant's Exhibit 1 to the preliminary hearing transcript is for a date of July 8, 1996, at which time "the patient reports she is still with back pain and reports that she has an appointment with Dr. Muraty (sic) for next Tuesday. Still with back pain which she says goes into her legs, more so in the left side

than the right." Dr. Rivera continued the light-duty work restrictions until Dr. Murati completed his examination.

Dr. Murati's report, which is Claimant's Exhibit 3, reflects that on July 15, 1996, claimant had "complaints of pain in the low back which the patient states is radiating down her legs bilaterally to the knee. It seems to occur on the left side with more frequency than on the right. She complains of numbness and weakness to both lower extremities. She is also having pain with walking."

The contemporaneous office notes of Dr. Rivera do indicate some worsening of claimant's symptoms during the period of June 14, 1996, through July 8, 1996. It is difficult to say whether or not the symptoms claimant presented to Dr. Murati represented a worsening of her condition over that which she had described to Dr. Rivera the week before. Nevertheless, it was claimant's testimony that her pain became progressively worse. It is not entirely clear whether the back condition worsened after June 24, 1996, when Dr. Rivera imposed the most severe restrictions, which Mr. Guzman testified respondent adhered to. The June 28, 1996, office notes reflect "no improvement" as opposed to the worsening of claimant's condition as described in the June 24, 1996, office note.

Although the medical records do support a finding of an aggravation through June 24, 1996, it is difficult to know whether the office notes of Dr. Rivera reflect an aggravation of claimant's low back condition such that a new injury can be found to have occurred "each workday", as opposed to simply a worsening of symptoms.

Claimant testified to a progressive worsening of her back condition and her testimony is supported by Dr. Rivera's office notes. Respondent argues Dr. Rivera was simply parroting whatever claimant told him as to both the aggravation of symptoms and the work-related nature of the condition. It is correct that most of what is written in Dr. Rivera's office notes in this regard is patient history. However, the fact that Dr. Rivera wrote "work related" on his work release form shows this was his medical opinion as well. The evidence of a work-related aggravation, if not cause, is uncontroverted in the record as it currently exists. Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy and is otherwise regarded as conclusive. Anderson V. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Accordingly, the Appeals Board finds an each-and-every-day aggravation through June 24, 1996. However, claimant's ten days to report that accident ended on July 4, 1996. As the record does not establish notice of a work-related accident was given before July 8, 1996, claimant has not met her burden of proving timely notice, unless just cause can be shown for the delay.

Claimant argued that she gave notice on the initial date of accident, whether that be April 1 or April 10, 1996. For the reasons stated above, the Appeals Board does not find that testimony credible. Furthermore, we do not find evidence in the record to support

a finding that claimant gave subsequent notice until she delivered the July 8, 1996, Work/School Release form. The Administrative Law Judge apparently did not find notice within 10 days either, but relied upon a finding of just cause to extend claimant's time to give notice to the 75 days the statute permits under such circumstances. This conclusion is based upon the following comments by the Administrative Law Judge:

> "THE COURT: I'm going to find it's more probably true than not that she did suffer some accident or back -- some injury to her back which is work related. As far as the timing on it, this stomach problem that she was having, I don't know what that was exactly and apparently the doctors weren't sure, one thought it might be an infectious thing, but in any case, it's possible it could have masked the pain, I guess, of a minor back injury, which is what this looks like at this point. And I just looked at it, even 75 days would give her till the end of July, about the 25th of July, so I'm going to go ahead and find the notice requirement has been met on that. So we'll move on from there." Prelim. Hr'g. at 46 and 47.

The Appeals Board agrees. Although the required notice was not given within ten days, the Appeals Board finds that claimant's failure to give such notice was due to just cause. Therefore, timely notice would have been given within the 75-day limit for aggravations occurring after April 24, 1996. In this regard, the Appeals Board adopts the findings and analysis of the Administrative Law Judge that claimant's stomach problems masked her low back pain. This finding applies only to claimant's initial low back injury, assuming that she sustained the back injury in the initial April 1 (alleged as April 10) lifting incident, and those aggravations occurring before June 14, 1996. There can be no allegation of a masking of the back symptoms after June 14, 1996, when claimant first reported lumbar pain to Dr. Rivera. Obviously by that date her back symptoms were no longer being masked. Accordingly, any just cause that existed prior to June 14, 1996, was no longer present from that date forward. Therefore, insofar as any back injury that occurred prior to June 14, 1996, is concerned, claimant had just cause for her failure to report same. However, for the alleged, subsequent aggravations beginning June 14, 1996, and each and every working day thereafter, no such cause existed. The Appeals Board finds herein that the back injury did occur on April 1 (alleged as April 10) from the original lifting incident and each and every working day thereafter. As for those subsequent accidents described as each-and-every-working-day aggravations after June 14, 1996, just cause has not been established.

It is most probable that claimant's present need for medical treatment is primarily due to the original injury of April 1, 1996, rather than the aggravations thereafter. As noted previously, more than 75 days had elapsed from the April 1, 1996, injury until it was reported on July 8, 1996. Accordingly, only those aggravations occurring after April 24, 1996, and before June 14, 1996, would be timely as being within the 75 days permitted by K.S.A. 44-520. There is no evidence as to what extent, if any, claimant's present back condition is attributable to aggravations during that time period. Therefore,

in that regard, claimant has failed to meet her burden of proof. Even under the rules announced in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) and Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995) for determining date of accident in repetitive trauma cases, the claimant's notice of accident was given out of time. As previously stated, claimant's symptoms plateaued and her condition ceased to worsen by June 24, 1996. Utilizing this date as the date of accident, claimant still did not give notice within ten days thereof.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the August 6, 1996 Order of Administrative Law Judge Jon L. Frobish, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

c: Charles W. Hess, Wichita, KS
P. Kelly Donley, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director